IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1774

NICOLA FORD,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

STANFORD SHMUKLER,
Twelfth Floor,
1314 Chestnut Street,
Philadelphia, Pennsylvania. 19107
Counsel for Petitioner.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

TABLE OF CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .

NICOLA FORD,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

NICOLA FORD, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 16, 1978.

OPINIONS BELOW.

The United States Court of Appeals for the Third Circuit, on May 16, 1978, affirmed the judgment of conviction and sentence entered by the United States District Court for the Eastern District of Pennsylvania. The Court of Appeals did not publish an opinion, but entered a Judgment Order, which has not yet been officially reported. A copy thereof appears as Appendix A, *infra*, page A1. Honorable J. William Ditter, Jr., United States District Judge for the Eastern District of Pennsylvania, imposed a sentence of three years imprisonment, followed by three years probation, on June 28, 1977, after denying defendant's timely post-trial motions. The Court's memorandum

and order, dated June 6, 1977, have not yet been officially reported, but a copy thereof appears as Appendix B, *infra*, pages A3-A6.

JURISDICTION.

The Judgment Order of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, page A1), affirming the judgment of the District Court, was entered on May 16, 1978. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Where, under state law, arson constitutes setting of a fire which either endangered another person or was intended to collect insurance on the premises, is the use of the mails by the petitioner to obtain increased insurance coverage on his property shortly before that property is destroyed by an intentional fire, or the subsequent proofs of claim submitted by him under his policy, sufficient to constitute a federal offense under the Travel Act (18 U. S. C. § 1952)?

2. In a prosecution for mail fraud under 18 U. S. C. § 1341, may the mailings which are used as the basis for charges under the Travel Act also be used to support mail fraud counts, where the mailings were not essential elements under the mail fraud statute, and the jury was incorrectly instructed as to the essential elements?

STATUTORY PROVISIONS INVOLVED.

The mail fraud statute, 18 U. S. C. § 1341, provides in pertinent part:

"§ 1341. Frauds and Swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

The Travel Act, 18 U. S. C. § 1952, provides in pertinent part:

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever . . . uses any facility in interstate or foreign commerce, including the mail, with intent to—

. . .

> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

STATEMENT OF THE CASE.

(a) The Proceedings.

The Court of Appeals for the Third Circuit affirmed the judgment and sentence imposed following petitioner's conviction by a jury on five counts of mail fraud, under 18 U. S. C. § 1341, and one count of interstate transportation in aid of racketeering, under 18 U. S. C. § 1952.

On March 17, 1977, petitioner, an insurance salesman and owner of The Palace, Inc., a corporation which operated the 1846 Colonial Inn, a bar restaurant and hotel which was destroyed by fire on October 13, 1974, was indicted for mail fraud and Travel Act violations, allegedly arising out of that fire. He was released on bail, pleaded not guilty and, in May 1977, went to trial before Honorable J. William Ditter, Jr., United States District Judge, and a jury. After an eight day jury trial, the jury found petitioner guilty on all counts. Timely post-trial motions were filed and denied, and on June 28, 1977 he was sentenced to concurrent terms of imprisonment for three years on counts 1, 2 and 3, followed by concurrent terms of probation of three years on the remaining counts. A timely appeal was filed and the case was argued on March 29, 1978 before the United States Court of Appeals for the Third Circuit, which on May 16, 1978 entered a Judgment Order affirming the judgment of the District Court.

(b) Summary of the Evidence.

The evidence offered at trial can be summarized briefly as follows. Several former employees testified that defendant had attempted to hire them to burn down the building.

John Savage testified that he was first employed by the Appellant in October or November of 1973 and continued to work there until about April or May of 1974 as

a "doorman." He further testified that in April of 1974 the petitioner offered him $5,000 to burn the Colonial Inn down, which he refused to do. In addition, he testified that he is presently in the midst of civil litigation with the petitioner for back wages allegedly due.

Ronald Tripler, a convicted felon, testified that he began employment with the petitioner in December of 1973 as manager of the bar, restaurant and hotel and also a part owner, and continued in those capacities until around March of 1974. He also testified that in February of 1974 the petitioner offered him $25,000 to burn the Colonial Inn. Mr. Tripler also testified that he too was in the midst of civil litigation with the petitioner.

The Government also called Frank Bello, another convicted felon and a friend of Ronald Tripler, who testified that he was employed by the petitioner as a chef from January 1, 1974 to March 1974 and as manager until August 1974. Bello also testified that the petitioner offered him $25,000 of the insurance proceeds if he would burn the Inn down on one occasion and on another occasion again suggested that Bello burn the establishment down.

Fred Ursomarso testified that he began work for the petitioner in August, 1974 as the chef and manager of the Colonial Inn. He testified that during September, 1974, he had a conversation with the petitioner during which he was told that Ford had made arrangements to have the Inn burned down for $5,000. On a second occasion, he had a conversation with petitioner during which Ford told him someone was coming to the Inn to "look it over" in relation to the fire. Finally, the night before the fire, Ford told the witness to remove certain items from the Inn. The witness further testified that he notified the tenants of the hotel part of the Inn to leave the hotel on October 13, 1974 because the exterminators were going to be there.

Bernard Sullivan testified that he was a part-time employee of the Inn. Approximately one week before the fire,

the petitioner's son removed a stereo system from the Inn.

Three witnesses testified as to the insurance aspect of the case. Specifically, they testified that the petitioner had increased the insurance coverage of the Inn before the fire, doing such at least in part through the mail.[1] They also testified that after the fire occurred, the petitioner submitted and caused to be submitted various documents in connection with this "Proof of Loss" to the insurance company, through the mail.

Robert Hammond testified that he was an occupant of the Inn, asleep in his room at the time of the fire, who barely escaped without injury.

Raymond Strawley, another employee of the Inn, testified that minutes preceding the fire, he saw a man leaving the area in which the fire started, run from the building and jump into a car which sped away. Strawley further testified that he assisted an elderly man from the burning building.

Several witnesses testified as to a description of the burning building.

George Wert, a Pennsylvania State Police fire marshal testified that in his expert opinion the fire was of incendiary origin, that is, set by human hands.

Also introduced by stipulation were corporate and personal income tax returns of the Palace, Inc. and of the appellant.

The defense also presented evidence, including testimony of petitioner's son Robert Ford, who offered an explanation as to why certain items had been removed from the Inn.

James Ott testified that he was an occupant of the Inn and was not told by Fred Ursomarso to be out of the Inn on the day of the fire.

---

1. At least a portion of the increased coverage was not to become effective until the date of renewal of the policy, which was after the fire.

The petitioner, Nicola Ford, testified that he did not start the fire, nor did he have anyone start the fire for him. He denied offering anyone money to start the fire or telling anyone he had paid to have the Inn burned. He also testified as to his reasons for the various insurance coverage on the Inn.

In addition, the petitioner presented the testimony of six character witnesses.

In rebuttal, the Government presented David Hughes, the petitioner's accountant, who testified as to some variations in copies of tax returns used during civil litigation related to the fire.

John Luchsinger, an attorney representing the insurance brokers, testified that at a deposition pertaining to the civil litigation arising out of this fire, Nicola Ford presented the altered tax returns.

The trial judge instructed the jury that under the law of Pennsylvania, arson may be committed in either of two ways: by someone who intentionally starts a fire and recklessly places another person in danger of death or bodily injury; or by one who intentionally starts a fire with the intent of destroying property to collect insurance. The Court instructed that under the Travel Act the Government must prove beyond a reasonable doubt three things: (1) that the defendant was engaged or involved in unlawful activity concerning the Inn, specifically arson, which is made unlawful by the laws of Pennsylvania; (2) that intending to promote, manage and carry on the unlawful activity, the defendant used the United States mail; and (3) thereafter he performed other acts to promote, manage and carry on the unlawful activity. The Court defined the words promote, manage and carry on as referring to the crime of arson. In other words, the Court said, the Government must prove beyond a reasonable doubt that the defendant violated the law of Pennsylvania by com-

mitting arson and that he intentionally used the United States mails to achieve or to help him achieve the purposes for which he committed the arson and that thereafter he did other acts to accomplish these purposes.

The Court also instructed the jury that the five counts of the indictment charging mail fraud require the Government to prove that the defendant devised a scheme or artifice or plan to defraud the insurance company by increasing the insurance on the premises in question, to cause the premises to be destroyed by fire, and then submit documentation to obtain the proceeds and receive the money from the company. The Court also instructed the jury that it is not necessary that the matter mailed be fraudulent or that it contain fraudulent representations, and that it was not even necessary that defendant send the letter or caused the letter to be sent. It would be sufficient to warrant a conviction if he knew or could reasonably foresee or anticipate that the mails would be used in some part of the scheme. The Court stated:

> "In other words, it is not necessary that the use of the mails be essential to the success of the scheme. It's enough if the mails contributed to the carrying out of the scheme." (N. T. 8-35).

The Court further instructed the jury that the existence of a scheme, a plan to defraud, is an essential element of the counts under the mail fraud statute, but not under the Travel Act.

Trial counsel made no objection to this charge. Following the verdict, trial counsel filed post-trial motions, in which he raised various evidentiary rulings by the trial judge. Following denial of those motions and sentence, a timely appeal was filed, and defendant sought new representation. The issues raised in this petition were first raised in the appellate court in the brief filed in the Third Circuit.

REASONS FOR GRANTING THE WRIT.

1. The Travel Act Cannot Be Interpreted to Make a Federal Crime Out of the Use of Mails to Obtain Increased Insurance Protection Before an Incendiary Fire or to Submit Proofs of Loss Following That Fire.

In the case at bar, defendant was charged with violating the Travel Act, 18 U. S. C. § 1952, by using the United States mails "with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: an arson in violation of the laws of the Commonwealth of Pennsylvania, and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity."

This indictment is drawn under the Travel Act, 18 U. S. C. § 1952, which prohibits the use of any facility in interstate or foreign commerce, including the mail, with intent to promote or facilitate the carrying on of any prohibited activity, where the defendant thereafter performs or attempts to perform any unlawful activity.

This statute has been interpreted to require proof of the following elements: (1) that the accused voluntarily used the facilities of interstate commerce; (2) that he attempt to or did in fact promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any one of any statutorily defined activity; and (3) that the accused form a specific intent to promote, manage, establish, carrying on or facilitate one of the prohibited activities. See *United States v. Prince*, 529 F. 2d 1108, 1112 (6th Cir. 1976), citing *United States v. Gebhart*, 441 F. 2d 1261 (6th Cir. 1971). It was also noted in that case that the Act requires proof of perform-

ance or an attempt to perform one or more of the proscribed activities *subsequent* to the interstate activity. *United States v. Prince, supra.* It is not enough that the interstate travel or use of interstate facility be merely incidental to the illegal operation; it must be an essential part. See *Rewis v. United States,* 401 U. S. 808 (1971) and cases discussed therein. Also see *United States v. Archer,* 486 F. 2d 670 (2nd Cir. 1973).

In the case at bar, the use of the mails which was charged in the indictment and which was proved at the trial related to submission of requests for increase of insurance coverage on the insured's premises prior to the fire and proofs of loss submitted subsequent to the fire. At no time however was there any showing that this use of the mails was an essential element in the crime of *arson,* which was the unlawful activity charged here. Under any but a strained interpretation of the Travel Act, the submission of such requests of proofs could not be considered to have fostered the crime of arson which, in its generic sense, is considered the intentional burning of a building. Under Pennsylvania law in effect at the time of this fire,[2] the crime of arson is defined more broadly than used in the generic sense; it includes that the intentional starting of a fire on his own property or that of another which recklessly places another person in danger of death or bodily injury. This is defined as a felony of the first degree. However, it also encompasses three other activities: starting a fire with intent to destroy a building of another; intentionally starting a fire on his own property which places a building of another in danger of destruc-

2. In *United States v. Nardello,* 393 U. S. 286 (1969), this Court held that provisions of the Travel Act are not limited to the common law meanings of the crimes defined therein nor to the precise definitions employed in the state statutes; rather, the question is whether the state prohibits the generic type of activity charged.

tion; or starting a fire with intent of destroying or damaging any property, whether his own or that of another, to collect insurance for such loss. These constitute a felony of the second degree. 18 C. P. S. A. § 3301.

Under the instruction given by the court to the jury, the jury could find defendant guilty if they were convinced that the defendant instigated the setting of a fire which either endangered another person or was intended to collect insurance on the premises, both of which fall within the definition of arson under state law. However, the court also instructed the jury that the mailings which were mentioned in the indictment and which were related to the mail fraud counts could be considered as evidence in determining whether there was a use of interstate facilities to aid the arson. In other words, the mailings could be considered by the jury both as the essential element in proving the existence of the state crime of arson, and also as the essential element constituting the federal crime. On the other hand, the court never clearly instructed the jury as to their obligation to find the essential federal element of the use of the mails subsequent to the illegal activity, namely, the arson.

Thus, under the court's interpretation of the Travel Act, as set forth in its instructions to the jury, any state crime of arson could also constitute a federal crime. This Court should determine whether this is an impermissible extension of the statute to expand federal jurisdiction to an extent not contemplated by Congress and not justified by the statutory langauge, as suggested by Judge Friendly in *United States v. Archer, supra,* and Justice Marshall's opinion in *Rewis v. United States, supra,* cited to and referred to by Judge Friendly.

2. In a Prosecution for Mail Fraud Under 18 U. S. C. § 1341, It Is an Unwarranted Extension of the Statute to Permit the Mailings Which Are Used as the Basis for Charges Under the Travel Act to Support Mail Fraud Charges Where the Mailings Were Not Essential Elements Under the Alleged Scheme.

In the first five counts, petitioner was charged with mail fraud by submitting claims or documents, in a scheme to defraud the insurance company, by attempting to obtain payment for insurance proceeds while concealing that he had caused the building to be burned. Two counts related to mailings which took place prior to the fire, dealing with applications for increase in insurance coverage; three counts related to mailings which took place subsequent to the fire, and related to an attempt to collect the insurance proceeds.

The court instructed the jury that it must find that a scheme existed, that defendant was a willing and knowing participant in the scheme, that the United States mails were used to carry on the scheme to defraud, that the use of the mails was something the defendant knew or could have reasonably foreseen as a part of the scheme to defraud.

In *Kann v. United States,* 323 U. S. 88 (1944) and *Parr v. United States,* 363 U. S. 370 (1960), this Court enunciated the proposition that the mere concurrence of a violation of the general purpose which the relevant federal statute, the mail fraud statute, is designed to serve and a use of interstate facilities does not make an act, even though morally reprehensible and violative of state law, a federal crime. See *United States v. Wechsler,* 392 F. 2d 344, 352 (4th Cir. 1968).

In the case at bar, as already noted, the use of the mails was not an essential part of the scheme or plan which

was, according to the Trial Judge, the *sine qua non* of a conviction under the mail fraud statute.

A hypothetical will help to put this in concrete terms. Assume that a defendant orders an insurance policy on his business, and then uses the mail to obtain increased coverage. Thereafter, his business starts to decline and he forms the intention of burning his building, which he subsequently does. Under the court's interpretation here, the use of the mail to obtain increased insurance coverage would constitute a violation of the mail fraud statute, even though the mailing occurred prior to the scheme, since it was an essential portion of the scheme.

This Court should determine whether the mail fraud statute can be extended to encompass such conduct, despite this Court's interpretation in *Kann* and *Parr, supra.*

CONCLUSION.

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted as to each of the questions presented herein.

Respectfully submitted,

STANFORD SHMUKLER,
Counsel for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1915

UNITED STATES OF AMERICA

v.

NICOLA FORD,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CRIM. NO. 77-119-1

Argued March 29, 1978

Before: ADAMS, VAN DUSEN and ROSENN, *Circuit Judges.*

Judgment Order.

After consideration of all contentions raised by the appellant, namely, that (1) the use of the mails to obtain increased insurance coverage before a fire and the submission of proofs of loss after the fire are not sufficient to constitute an offense under the Travel Act; (2) the district court's definition of arson in this case was misleading and confusing; and (3) a conviction on the mail fraud counts cannot be sustained since they were based on the same mailings charged in the counts charging violation of the

Travel Act, the mailings were not essential elements of the offense, and the jury was incorrectly instructed as to its elements, it is

ADJUDGED and ORDERED that the judgment of the district court be and it is hereby affirmed.

By THE COURT,

ARLIN M. ADAMS
Circuit Judge

ATTEST:

THOMAS F. QUINN
Thomas F. Quinn, Clerk

DATED: May 16, 1978

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 77-119

UNITED STATES OF AMERICA

v.

NICOLA FORD

Memorandum and Order.

DITTER, *J.* June 6, 1977

Nicola Ford was convicted by a jury of five counts of mail fraud in violation of 18 U. S. C. § 1341 and one count of violating the Travel Act, 18 U.S.C. § 1952. Ford was the owner of the Palace, Inc., a corporation which operated the 1846 Colonial Inn, a bar, restaurant, and hotel. In October, 1974, the premises were destroyed by fire. The jury's verdict showed that it believed Ford caused the fire to be set so that he could collect insurance for the loss of the building. In his post-trial motion for judgment of acquittal or a new trial,[1] Ford raises only two arguments which require any discussion.[2]

1. Although his written motion is styled simply "Motion for New Trial," in it Ford asserts that the court erred in denying his motions for judgment of acquittal made at the close of the government's case and renewed at the conclusion of all the evidence.

2. While not discussed herein the remaining arguments advanced by Ford have been fully considered by the court and found to be totally lacking in merit.

First, Ford contends that the court improperly took judicial notice that arson is a crime under the laws of Pennsylvania,[3] thereby relieving the prosecution of the burden of proving beyond a reasonable doubt an essential element of the Section 1952 violation. It is the defendant's position that the government should have called an expert on Pennsylvania law to testify that arson is a crime in this Commonwealth in much the same way that a party may establish the law of a foreign state. See Fed. R. Crim. Proc. 26.1; Fed. R. Civ. Proc. 44.1. However, the long-standing rule is quite the contrary: federal courts are obligated to take judicial notice of the laws of the several states of the Union. See, e.g., *United States v. Atwell,* 71 F. R. D. 357, 361-62 (D. Del. 1976). Therefore, there was no error in this regard.

The defendant's remaining argument is that the court erred in restricting his counsel's cross-examination of Fedele (or Fred) Ursomarso. Ursomarso was an important government witness. He had been an employee of the defendant and his testimony concerned, inter alia, admissions made by Ford that he intended to burn down the 1846 Colonial Inn. The defense was given wide latitude in cross-examining Ursomarso. For example, I permitted counsel to bring out matters only tangentially related to credibility such as the fact that after the fire Ursomarso collected unemployment compensation while at the same time operating his own business and the fact that he gave an insurance company his sister's address as his residence in order to obtain more favorable auto insurance rates. However, I drew the line when counsel attempted to cross-examine Ursomarso about a default judgment that had been entered against him in an unrelated civil case. Counsel offered absolutely no explanation of how this default judgment was in any way relevant to any matter at issue

3. 18 Pa. C. S. A. § 3301.

in the case *sub judice* including the credibility of Ursomarso as a witness. In these circumstances it was well within my discretion to refuse to permit this line of inquiry. See *United States v. Dalton,* 465 F. 2d 32, 35 (5th Cir.), cert. denied, 409 U. S. 1062, 93 S. Ct. 570 (1972), reh. denied, 409 U. S. 1131, 93 S. Ct. 945 (1973); *United States v. Wooden,* 420 F. 2d 251, 253 (D. C. Cir. 1969); *Lyda v. United States,* 321 F. 2d 788, 793 (9th Cir. 1963); cf. 31A C. J. S. *Evidence* § 177 (1964).

For the reasons stated above the motions for judgment of acquittal and a new trial must be denied.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 77-119

UNITED STATES OF AMERICA

v.

NICOLA FORD

Order.

AND NOW, this 6th day of June, 1977, for the reasons stated in the foregoing memorandum, it is hereby ordered that the motions of Nicola Ford for judgment of acquittal or a new trial are hereby denied. The defendant shall report for sentencing on June 28, 1977, at 9:30 A. M. in Court Room 6A, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania.

By THE COURT:

J. WILLIAM DITTER, JR.
J.

No. 77-1774

In the Supreme Court of the United States

OCTOBER TERM, 1978

NICOLA FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
KATHERINE WINFREE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1774

NICOLA FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1978. The petition for a writ of certiorari was filed on June 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's convictions for mail fraud.

2. Whether the evidence showed that petitioner used the mails to promote the unlawful activity of arson, in violation of 18 U.S.C. 1952.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of five counts of mail fraud (Counts 1 through 5), in violation of 18 U.S.C. 1341, and one count of interstate travel in aid of arson (Count 6), in violation of 18 U.S.C. 1952. He was sentenced to concurrent terms of three years' imprisonment on counts 1 through 3, to be followed by concurrent terms of three years' probation on Counts 4 through 6. The court of appeals affirmed (Pet. App. A).

The evidence showed that in the spring of 1973 petitioner became the principal stockholder of a corporation that owned and operated the 1846 Colonial Inn, a bar and hotel in Crum Lynne, Pennsylvania (1 Tr. 30-32). Thereafter, petitioner experienced managerial and financial difficulties with the bar (1 Tr. 39-42, 88; 2 Tr. 19-20, 24; 3 Tr. 42, 43A-44). Accordingly, during the first half of 1974 he separately approached three employees to whom he offered substantial sums of money to burn down the bar; each refused (1 Tr. 41-42, 92-94; 2 Tr. 26-29). In late September 1974, petitioner advised a fourth employee that he had made arrangements to have the bar burned on October 13 for $5,000 (3 Tr. 45-46, 48-52). On October 4 and October 7 petitioner mailed to his insurance agency requests for significant increases in insurance coverage for the premises, and the insurance coverage was increased effective October 4, 1974 (2 Tr. 126-139; 3 Tr. 2-3; G. Exs. 6-8).[1]

On October 13, 1974, the 1846 Colonial Inn was destroyed by a fire of incendiary origin (4 Tr. 30, 51).[2] On December 6 and 17, 1974, and February 13, 1975, a claim

[1]These mailings formed the basis for Counts 1 and 2.

[2]Several persons were in the building when the fire started, but there were no serious injuries (3 Tr. 118-121, 133-137).

adjustment company acting on petitioner's behalf mailed various documents to his insurance company in connection with his claim of loss on the bar. Each mailing contained, *inter alia*, representations by petitioner that he believed the fire to be of undetermined origin and not the result of any action on his part (4 Tr. 64-112).[3]

ARGUMENT

1. Petitioner contends (Pet. 12-13) that the evidence failed to establish a sufficient nexus between his use of the mails and his scheme to commit arson and collect insurance to support his convictions for mail fraud.[4]

The offense of mail fraud is established by proof of a scheme to defraud and the mailing of a letter or other matter in furtherance of the scheme. Knowing use of the mails is shown " 'where such use can reasonably be foreseen, even though not actually intended * * * [and it] is not necessary that the scheme contemplate the use of the mails as an essential element.' " *United States* v. *Maze*, 414 U.S. 395, 399-400 (quoting *Pereira* v. *United States*, 347 U.S. 1, 8-9); *United States* v. *Kaplan*, 554 F. 2d 958, 965 (C.A. 9), certiorari denied *sub nom. Dolwig* v. *United States*, 434 U.S. 956. Furthermore, mailings are in furtherance of the scheme if they are "incident to an essential part of the scheme." *Pereira*, *supra*, 347 U.S. at 8.

Here the evidence clearly established that petitioner committed mail fraud. Petitioner devised a scheme to

[3]Counts 3 through 5 arose out of these mailings.

[4]Petitioner also objects to the district court's instructions on mail fraud (Pet. 12-13), but the grounds for his objection are not clear and he made no objection to the instructions at trial (Pet. 8). The record shows, in any event, that the court correctly instructed the jury about the elements of mail fraud (8 Tr. 33-36).

defraud his insurance company of the proceeds of the insurance policy covering the bar. On two occasions in furtherance of that scheme, he mailed requests for increases in the policy limits. After arranging for the bar to be burned, petitioner separately caused three "proof of loss" documents to be mailed to his insurer falsely representing that he was not responsible for the destruction of the bar. In short, petitioner's mailings were not only "closely related" (*Maze, supra,* 414 U.S. at 399) to his scheme, but obviously were also an integral part of it.[5]

2. Petitioner also challenges (Pet. 9-11) his conviction on Count 6 under the Travel Act, 18 U.S.C. 1952. The sentence petitioner received on the count was identical to and concurrent with those imposed on Counts 4 and 5. As we have shown, those convictions were valid, and accordingly this Court need not grant review to consider petitioner's claims with regard to Count 6. *Andresen* v. *Maryland,* 427 U.S. 463, 469 n. 4; *Barnes* v. *United States,* 412 U.S. 837, 848 n. 16. In any event, his contentions are without merit.

Count 6 charged that petitioner's mailings violated the Travel Act, 18 U.S.C. 1952 (a) (3), because they were used to carry on the crime of arson, in violation of the laws of

[5]*Kann* v. *United States,* 323 U.S. 88, and *Parr* v. *United States,* 363 U.S. 370, on which petitioner relies (Pet. 12-13), are inapposite. The mailings alleged in those cases were not used in furtherance of the fraudulent scheme. They were either mailings that occurred after the fruition of the scheme (*Kann* and *Parr*) or were mailings that the defendants were required by law to make (*Parr*). Here the mailings occurred before the fruition of the scheme and were not required by law.

Petitioner's hypothetical concerning mailings prior to the formation of the scheme to defraud (Pet. 13) bears no relation to the facts of this case or the district court's instructions.

Pennsylvania.[6] Petitioner alleges that the evidence was not sufficient to establish a violation of the Travel Act because the prosecution failed to prove that the mailings were used to foster the crime of arson (Pet. 10). Under Pennsylvania law, however, the crime of arson includes the starting of a fire "with intent of destroying or damaging any property, whether [one's] own or of another, to collect insurance for such loss." 18 C.P.S.A. § 3301(b)(3)(1973) (Pet. 11). In the instant case, the evidence established that petitioner mailed requests for increased insurance coverage, intending to defraud his insurance company by setting fire to the bar and collecting the increased proceeds for the loss. Accordingly, the mailings were used for the purpose of "carrying on" the crime of arson, as defined by Pennsylvania law, in violation of the Travel Act.[7]

Rewis v. *United States,* 401 U.S. 808, and *United States* v. *Archer,* 486 F. 2d 670 (C.A. 2), upon which petitioner relies (Pet. 10-11), are inapposite. In *Rewis* the defendants were convicted under the Travel Act for conducting a gambling operation frequented by out-of-state bettors. There was no evidence that the defendants actively sought

[6]The Travel Act makes it unlawful to travel or use any facility (including the mails) in interstate commerce with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." 18 U.S.C. 1952(a)(3). The definition of "unlawful activity" includes arson, in violation of state or federal law. 18 U.S.C. 1952(b)(2).

[7]That Congress intended the Travel Act to prohibit the use of the mails in connection with arson such as that involved here is reflected in its legislative history. In 1965, the crime of arson was added to the definition of unlawful activity in subsection (b) (2) out of concern that arson was often used by organized crime to collect under insurance policies. See H.R. Rep. No. 264, 89th Cong., 1st Sess. (1965); *United States* v. *Nardello,* 393 U.S. 286, 291 n. 8.

interstate patronage, or that they themselves traveled or used facilities in interstate commerce. This Court held that Congress did not intend to make criminal activity a federal offense "solely because that activity is at times patronized by persons from another State" (401 U.S. at 812). In *Archer*, the Second Circuit applied the principles of *Rewis* to reverse the convictions of defendants involved in an incident of local corruption; the court found that interstate and foreign telephone calls from undercover agents to the defendants were in no way initiated by the defendants and were made by the agents solely to create federal jurisdiction. Here, in contrast, it is undisputed that the use of interstate facilities (the mails) was initiated by petitioner.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
KATHERINE WINFREE,
Attorneys.

AUGUST 1978.

---

[8]Petitioner also objects to the district court's instructions on the Travel Act (Pet. 11), but his reasons are not clear, and again, no objection was made to the district court (Pet. 8). In this case the mailings were evidence of the state crime of arson (which includes burning to obtain insurance proceeds) and also evidence of the Travel Act violation. That does not mean, contrary to petitioner's assertion (Pet. 11), that "any state crime of arson could also constitute a federal crime."